IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

MISC. PETITION NO. 56 OF 2000

WITH

MISC. PETITION NO. 57 OF 2000

WITH

MISC. PETITION NO. 58 OF 2000

WITH

MISC. PETITION NO. 59 OF 2000

WITH

MISC. PETITION NO. 60 OF 2000

WITH

MISC. PETITION NO. 61 OF 2000

MISC. PETITION NO. 56 OF 2000

SICOM LIMITED .. Petitioner.

vs.

Shri Prabhudayal B.

Chamaria .. Respondent.

Mr. Kevic Setalwad with M.P. Rege for petitioner.

Mr. S.C. Naidu i/by C.R. Naidu & Co.

for respondent.

MISC. PETITION NO. 57 OF 2000

SICOM LIMITED .. Petitioner.

vs.

Shri Prabhudayal B.
Chamaria & Ors. .. Respondents.

Mr. Kevic Setalwad with M.P. Rege for petitioner.
Mr. S.C. Naidu i/by C.R. Naidu & Co.
for respondents.

MISC. PETITION NO. 58 OF 2000

SICOM LIMITED .. Petitioner.

vs.

Shri P.B. Chamaria
& Oea. .. Respondents.

Mr. Kevic Setalwad with M.P. Rege for petitioner.
Mr. S.C. Naidu i/by C.R. Naidu & Co.
for respondent.

MISC. PETITION NO. 59 OF 2000

SICOM LIMITED .. Petitioner.

vs.

Shri Prabhudayal B.
Chamaria .. Respondent.

Mr. Kevic Setalwad with M.P. Rege for petitioner.

Mr. S.C. Naidu i/by C.R. Naidu & Co.
for respondent.

MISC. PETITION NO. 60 OF 2000

SICOM LIMITED .. Petitioner.
vs.
Shri Prabhudayal B.
Chamaria .. Respondent.

Mr. Kevic Setalwad with M.P. Rege for petitioner.
Mr. S.C. Naidu i/by C.R. Naidu & Co.

MISC. PETITION NO. 60 OF 2000

SICOM LIMITED .. Petitioner.
vs.

Shri Prabhudayal B. Chamaria .. Respondent.

Mr. Kevic Setalwad with M.P. Rege for petitioner.
Mr. S.C. Naidu i/by C.R. Naidu & Co.
for respondent.

MISC. PETITION NO. 61 OF 2000

SICOM LIMITED .. Petitioner.

vs.

Shri Vinod Kumar M.

Gadia & Anr. .. Respondent.

Mr. Kevic Setalwad with M.P. Rege for petitioner.

Mr. S.C. Naidu i/by C.R. Naidu & Co.

for respondent.

CORAM : S.U. KAMDAR, J.

DATE : 25TH APRIL, 2005.

1. The present group of petitions is filed under section 31 (1) (aa) of the State Financial Corporation Act. Since both the parties to the petition agree that the facts in each of the present petition is almost identical and issues raised are also similar, the said group of petitions can be disposed of by a common judgment.

2. The facts in Miscellaneous Petition No. 56 of 2002 are taken for the purpose of the present judgment.

3. The petitioner is the deemed State Financial Corporation within the meaning of section 46 of the State Financial Corporation Act, 1951. The Company

known as Shree Shyam Fabrics Ltd., (hereinafter referred to as the said Company) approached the petitioner for sanction and grant of term loan. In May, 1989 a request was made to disburse term loan of Rs. 83 lacs for the purpose of establishing the unit of process house for processing of fabrics at Tarapur MIDC Industrail Area, Taluka Palghar, Dist. Thane. In 1993, a further request was made for grant of additional term loan of Rs. 150 lacs for the very same project. On 28.6.1993, even the additional term loan of Rs. 150 lacs was sanction. The said company executed a term loan agreement dated 18.10.1993 inter alia containing therein terms and conditions for repayment of the said loan. A deed of hypothecation dated 18.10.1993 was also executed and an equitable mortgage was created in respect of the immovable properties by deposit of the title deeds. The aforesaid securities were given to secure the repayment of the aforesaid loan amount. There was further term loan granted by MSFC and Canara Bank also to the said company. The equitable mortgage was created in respect of the assets of the petitioner and other financial institutions and banks were pari passu charge holder.

4. To secure the repayment of the aforesaid amount apart from the deed of hypothecation and the equitable mortgage, the respondent nos. 1 and 2

also executed a deed of guarantee dated 19.10.1993 in favour of the petitioner and it was inter alia agreed by the respondent nos. 1 and 2 that in an event of failure in payment of the amount by the said company, the respondent nos. 1 and 2 shall make good the said payment under the said personal guarantee executed by them. Respondent nos. 3 and 4 executed a deed of guarantee dated 28.10.1993. Another deed of guarantee was executed on 18.10.1993 by respondent nos. 5 to 7 giving identical assurance of repayment of the loan. Thus, the respondent nos. 1 to 7 are the guarantors in respect of the liabilities of the said principal debtor which is the said company under the said term loan account. Out of the said loan amount sanction of Rs. 150 lacs the company availed of and utilised the amount of Rs. 144 lacs but did not make any repayment. In the aforesaid circumstances, in 1997 a demand notice was sent demanding a sum of Rs. 41,51,062/-. However, the company did not make any payment of either principal amount or interest in respect thereof. In 1998, the company approached the B.I.F.R. under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985 and the said case is registered. In view thereof, the company refused to make payment of the aforesaid amount due and payable by the company to the petitioner. Ultimately, by a notice dated 31.5.2000, the petitioners invoked the personal

guarantee of respondent nos. 1 to 7 and called upon them to make payment of the aforesaid amount. However, by letter dated 14.6.2000 the advocate for respondent nos. 1 to 3 and 5 to 7 denied their liability to make payment. In view of the non-payment thereafter, the present petition is filed by the petitioner under section 31 (1) (aa) of the said ACt for recovery of the aforesaid amount. As on the date of the filing of the petition there was an outstanding claim due and payable by the guarantors nos. 1 to 7 to the petitioner in the sum of Rs. 3,05,94,351.00 which included the interest amount due and payable by the said respondent herein.

5. Two additional affidavits have been filed by the petitioner dated 28.3.2005 and 29.3.2005 inter alia clarifying certain entries in respect of which the arguments were advanced by the learned counsel for the respondents. It also takes into account the judgment of the Apex Court in the case of Central Bank of India v. Ravindra & Ors. reported in 2002 (1) SCC 367 and the interest component has been accordingly so adjusted. The respondents have filed affidavit in reply and has raised following contentions.

(i) Firstly it has been contended that the present petition ought not to be heard because it

has been adjourned sine die by virtue of the fact that the said company is referred to BIFR under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985. It has been contended that in view of section 22 of the said Act, the present petition cannot be proceeded with. It has been contended that the said BIFR has rejected the reference but an appeal has been preferred to the AAIFR being appeal no. 53 of 2003. The learned counsel for the respondent has thus contended that the present proceedings ought not to be proceeded with in view of the prohibition contained under section 22 of the said Act.

(ii) The next defence raised is in respect of the liability to pay interest. It has been contended that the Reserve Bank of India guidelines in respect of the sick industrial company entitle such a company the concessional rate of interest at 13.5% on the principal amount and the respondent as a guarantor must be entitled to such reduced rate of interest and not the rate of interest as claimed by the petitioner herein. It has been contended that the claim raised against the sureties cannot exceed the claim as against the principal debtor and, therefore, also the same should be reduced accordingly. It has been also contended that there has been a compound interest levied on the respondents herein.

(iii) The next contention raised by the respondents is that the sales tax incentive which the petitioner is entitled to as a interest free loan entitlement has not been credited by the petitioner in their account and thus the said credit is not given. It has been further contended that the petitioner has also not given certain credit which they ought to have given in view of the amount deposited by the said company in various proceedings in this Court, particularly in a writ petition preferred by the company against the petitioner.

6. Firstly dealing with the contention that the present petition cannot proceed in view of the provisions of Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985, it is required to be considered whether the provisions of the said section 22 apply in the present case which is a proceeding not in the nature of a suit. The provisions of section 22 (1) which are relevant in the present case read as under :-

> 22. Suspension of legal proceedings, contracts, etc.-- (1) Where in respect of an industrial company, an inquiry under Section 16 is pending or any scheme referred to under Section 17 is under preparation or consideration or a sanctioned scheme is

> under implementation or where an appeal under section 25 relating to an industrial company is pending, then, notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), or any other law or the memorandum and articles of association of the industrial company or any other instrument having effect under the said Act or other law, no proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof, [and no suit for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company] shall lie or be proceeded with further, except with the consent of the Board or, as the case may be, the Appellate Authority."

The said section 22 (1) originally as enacted did not give any protection to the guarantors in respect of the guarantees given for the dues of the principal debtor i.e. the company which has been declared a sick company. However, by an amending Act No. 12 of 1994, the following words are

inserted in the said section.

> "[and no suit for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company]"

Thus, by an amendment a limited protection has been granted to the guarantors where no suit can be filed for recovery of the money or for enforcement of any security in respect of a guarantee given by a person for a loan which has been advanced or granted to the industrial company. Thus, to fall in the said exception granted by an amending act which is a limited protection it is necessary that the proceedings which has been initiated must be a suit for the recovery of the money of any guarantee in respect of any loan so advanced to an industrial company. In the case of Gujarat State Financial Corporation vs. M/s. Natson Manufacturing Co. Pvt. Ltd., & Ors., reported in AIR 1978 SC 1765 which arose under the Court Fees Act it was held that the nature of the proceedings under sections 31 and 32 of the Act is not in the nature of the suit or for money recovery proceedings. It was held that the said proceedings is something akin to an application for an attachment of the property in execution of a decree at a stage posterior to the

passing of the decree. It was held that the same could not be styled as substantive relief capable of being valued in terms of monetary gain or prevention of monetary loss. It was thus held that the proceedings filed under section 31 (1) of the Act is not a suit. The aforesaid view of the Apex Court has been followed by the Division Bench of the Bombay High Court in the case of The Maharashtra State Financial Corporation vs. M/s. Jaycee Drugs & Pharmaceuticals Pvt. Ltd., and others reported in AIR 1991 Bombay 96. The Division of this Court in the case of Dewal Singhal v. State of Maharashtra reported in 2001 Vol 106 Company Cases page 587 has in fact while considering the provisions of section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 held that the protection conferred under section 22 is a limited protection and the bar is restricted only to a suit and does not apply to any other proceedings. The relevant portion of the said judgment reads as under :-

> "Reliance is placed on the provisions of section 2 of the SICA as interpreted by the Supreme Court in the judgment of Patheja Brothers Forgings and Stamping Ltd. v. ICICI Ltd. [2000] 102 Company Cases 21; [2000] 8 IT SC 252. The Supreme Court after analysing the provisions of section 22, held in Patheja Brothers Forgings and Stamping

Ltd.’s case [2000] 102 Comp Cas 21; [2000] 8 IT SC 252 that in the case of an industrial company in respect of which proceedings are pending in the BIFR no proceedings for winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company, or for the appointment of a receiver, could be instituted or proceeded with. A suit or any proceedings for the enforcement of security could not be maintained against such industrial company and a suit for enforcement of a guarantee in respect of any loan or advance granted to the industrial company was barred. A reading of the judgment of the Supreme Court makes out this distinction and the learned judge was, therefore, right in his view that, as far as the proceedings against the guarantor of the loan to the industrial company are concerned, the bar under section 22 is restricted only to a 44 suit" and does not apply to any other proceedings. The learned single judge also relied on the judgment of this Court in Sharad R. Khanna v. Karimjee Ltd. [1995] 84 Compp Cas 611; [1994] 3 BCR 223. The Division Bench of this court, in this case, was squarely concerned with a situation of an insolvency

> notice issued to such a guarantor company. The Division Bench opined that it was difficult to consider the issuance of an insolvency notice as "proceeding further" with the original suit. It was held that an insolvency notice is an independent proceeding with its own consequences, although it may be considered as a mode of equitable execution."

My attention is also drawn to the judgment of the Division Bench of this Court in the case of Mrs. Padma Prafulla Shirke & Anr. vs. Maharashtra State Financial Corporation, reported in 2003 (2) ALL MR 884. Though the said judgment considered the provisions of section 22 in the context of section 29 of the State Financial Corporation Act but the Court has in paragraph 16 held that the provisions of section 22 (1) of the Sick Industrial Companies (Special Provisions) Act, 1985 apply only to the suit and does not apply to the proceedings other than a suit. It was held that the proceedings under section 29 to take over the assets and dispose of the same is not a suit and, therefore, the provisions of section 22 cannot apply. Thus, in view of the fact that the Apex Court has held that the proceedings under section 31 (1) is not in the nature of a suit. Thus, obviously, limited protection granted by the Amending Act No. 12 of

1994 under the provisions of section 22 would not apply to the proceedings in the nature of miscellaneous petition under section 31 which is held to be akin to the posterior stage to the filing of the suit and not a suit itself. In view of the aforesaid position in law, I am unable to accept the contention advanced by the learned counsel for the respondent company that the provisions of section 22 apply and, therefore the present proceedings cannot be proceeded with.

7. There are further submissions advanced by the learned counsel for the respondent that there are certain amounts which are deposited by the respondent in pursuance to the orders passed by the Court in a writ petition and the said credit has not been given in its proper account. For the aforesaid purpose an additional affidavit has been filed by the petitioner and it has been explained that Rs. 20 lacs which is deposited pursuant to the order passed by the Division Bench on 12.2.1998 in a writ petition has been given due credit in misc. petition No. 59 of 2000. It was stated that the same is done because the said amount carried a higher rate of interest at 27.5% whereas the account in Misc. Petition No. 56 of 2000 contained a lower rate of interest at 18.5%. However, in view of the insistence on the part of the respondents that the said amount should be given credit to in respect of

this account and not in the account where interest is higher, the petitioners have given a revised statement giving necessary credit accordingly.

8. The next contention advanced is in respect of the rate of interest and it has ben claimed that the petitioner is entitled to concessional rate of interest. In so far as the said contention is concerned, it has been stated that the Reserve Bank circulars are not applicable to the petitioner as a financial institution and, therefore, the respondent cannot take benefit of the said so called circular of reduction in the interest which has been granted by the Reserve Bank of India. The said circulars are issued under the Banking Regulation Act and apply only to the banks and not to the financial institutions.

9. The learned counsel for the respondent has relied upon a judgment of the learned Single Judge of the Rajsthan High Court in the case of M/s. Man Industrial Corporation Ltd., v. Rajasthan Financial Corporation, reported in AIR 1997 Rajassthan 108 and has contended that the respondent company is entitled to similar benefit of interest at the rate of 10.5%%. My attention is drawn to paragraph 29 of the said judgment which reads as under :-

"29. It is under the aforesaid

circumstances that the present revision petition has been preferred to this Court. During the course of hearing, it has been brought to the notice of this Court that during the pendency of appeal before A.A.I.F.R., the M.I.C. made several efforts for re-schedulement of the balance of loan amount as per the norms prescribed by the Reserve Bank of India. As per the R.B.I., the total outstanding is to be divided into principal and interest and only the concessional rate of interest is chargeable @ 13.5% and 10.5% for principal and interest separately. Contrary to the statutory guidelines of the R.B.I., the respondent-R.F.C. insisted for the payment ofinterst computed with half yearly rest, which in my opinion is un-conscionable and not recoverable from the M.I.C. having been declared a sick industrial undertaking under the Act, 1994. Thus only simple interest should be charged from the Company in accordance with the R.B.I. guidelines, I am further of the opinion that since the company has already paid substantial amount to the Corporation, the Corporation should give the adjustment of the amount already paid and the balance amount may be realised on instalments basis as may be agreed to

between the parties. Alternatively lump sum amount may also be paid as one time settlement after calculating the interest not on the basis of half yearly rest as that would be unconscionable. The future interest should be calculated w.e.f. 1-1-78 instead of 1-1-77. The aforesaid modification in the impugned decree has become necessary in view of the conflicting terms of interest being insisted upon by the respondent corporation and also keeping in view the fact that the learned executing Court has gone beyond the decree and has acted in a manner as if it was sitting in an appeal against the Order passed by the trial Court. Hence the impugned order and decree dated 22nd September '77 is modified as above. The revision is allowed with the direction that the petitioner-Company is liable to pay the future interest to the Corporation % 5% above the bank rate prevailing from time to time subject to a minimum of 13.5% as agreed to between the parties in pursuance to the compromise and the corporation is not entitled to charge interest on half yearly rests basis."

10. As against that, the learned counsel for the petitioner has drawn my attention to the judgment of

the learned Single Judge of this Court in Notice of Motion No. 1466 of 1997 in Suit No. 1519 of 1997 in the case of Ashokkumar Jasraj Shah vs. Maharashtra State Financial Corporation, decided on 28.1.2000 particularly paragraphs 3 and 4 of the said judgement which reads as under :-

> 3. The learned Counsel appearing for the Plaintiff submits that though there is an agreement between the parties, and that there is a clause in that agreement for charging compound interest, he submits that in view of the directions issued by the Reserve Bank of India dated 12th December, 1977, 20th February, 1981 and 6th February, 1987, the Defendant could not have charged compound interest and could not also have charged interest at the agreed rate, but at the lesser rate. Thus the whole of the Plaintiff's case turns on the question whether the instructions issued by the Reserve Bank of India result in modifying the term in the agreement between the parties. The case of the Defendant is that the circulars issued by the Reserve bank of India, which have been relied on by the Defendant, on their face show that they are addressed to the Schedule Commercial Bank and they have not been addressed to the

State Financial Corporation. According to the Defendant, instructions and guidelines issued by the Reserve Bank of India are not binding on the State Financial Corporation, in view of the provisions contained in Section 39 of the State Financial Corporation Act. According to the Defendant, the controlling authority of the State Financial Corporation is the State Government and the Development Bank.

4. Now, if in the light of these rival submissions the record of the case is perused, it becomes clear that there is a clear agreement between the parties, which contemplates payment of compound interest at the rate which is specified in the agreement. Now this term in the agreement can be modified either by another agreement reached between the parties or by a direction issued by a statutory authority, which is binding on the Defendant. The Plaintiff does not plead any subsequent agreement between the parties, however, relies on the circulars issued by the Reserve Bank of India, and therefore the question that is to be examined is whether the circulars issued by the Reserve Bank of India, which have been relied on by the

Plaintiff have the result of modifying or altering the agreed terms in the agreement between the parties. In order that a circular issued by the Reserve Bank of India can be said to have that effect, it will have to be shown that the circular issued by the Reserve Bank of India is binding on the Defendant. Perusal of the circulars shows that they are not addressed to any State Financial Corporation, but they are addressed only to the Schedule Commercial Bank. Perusal of the provisions of section 39 shows that the directions issued by the State Government and the Development Bank are binding on the State Financial Corporation. It is to be noted, however, that under the provisions of section 39 of the State Financial Corporation Act before enactment of the Public Financial (Amendment) Act, 1975, a direction issued by the Reserve Bank of India was binding on the State Financial Corporation. However, by the abovereferred amendment Act the words "Reserve Bank" were deleted and instead the words "Development Bank" were substituted. The intention of the Legislation is thus clear that after 1973 power to issue a direction to the State Financial Corporation is vested in the State Government and

Development Bank and the Reserve Bank of India does not exercise any such power. The Plaintiff could not point out any provision in the law which vests in the Reserve Bank of India power to issue direction to a State Finance Corporation established under the State Financial Corporation Act, which will have the effect of altering the term of an agreement between the State Finance Corporation and third parties regarding the rate of interest on the loan advanced by the State Finance Corporation to the third party. It is thus clear that the contention of the Plaintiff that because of the circular issued by the Reserve Bank of India, which has been relied on by the Plaintiff, the agreed terms of the agreement between the parties stand altered has no substance. The Plaintiff thus does not have prima facie case for grant of any interim injunction in his favour. The Notice of Motion is, therefore, disposed of. Ad-interim injunction is vacated."

11. It has been pointed out that the circular issued by the Reserve Bank of India is not applicable to the State Financial Corporation. In view of the aforesaid judgment of the learned Single Judge of this Court with which I am in concurrence

that unless the respondents show that the said circular issued by the Reserve Bank of India applies to the State Financial Corporation, it is not possible to grant relief of concessional rate of interest to the respondent herein.

12. The third contention raised pertains to giving credit of sale tax incentive which has been explained in paragraph 6 of the affidavit in reply by the learned counsel as under :-

> "Out of the total amount sanctioned under the sales tax incentive benefit of Rs. 45.78 lacs only Rs. 11.80 lacs has been disbursed by the Government and the remaining amount of Rs. 33.98 lacs though approved has not been disbursed because under the provisions of the scheme the said amount can be disbursed subject to the availability of funds by the State Government.

It has been stated in the said affidavit that the amount so received has been duly paid over by the petitioner to the principal debtor. In view thereof the question of giving further credit of the same amount does not arise.

13. In the aforesaid circumstances, I find no merit in the contentions advanced by the learned counsel for the respondent and accordingly I allow the petition accordingly.

14. In the aforesaid circumstances, I allow the present petition and direct that the respondent nos. 1 to 7 to make payment to the petitioner of a sum of Rs. 2,88,23,765/- in Misc.Petition No. 56 of 2000, Rs. 32,53,652/- in Misc. Petition No. 57 of 2000, Rs. 3,91,20,806/- in Misc. Petition No. 58 of 2000, Rs. 1,04,74,024/- in Misc. Petition No. 59 of 2000, Rs. 88,02,052/- in Misc. Petition No. 60 of 2000 and Rs. 1,23,26,906/- in Misc. Petition No. 61 of 2000 with further interest at the rate of 12% per annum till payment and/or realisation. However, there shall be no order as to costs.